1992

State of Utah v. Mark S. Blaha : Brief of Appellee

Utah Court of Appeals

Joan C. Watt; Elizabeth A. Bowman; Salt Lake Legal Defender Assoc.; Attorneys for Appellant.
R. Paul Van Dam; Attorney General; David B. Thompson; Assistant Attorney General; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920328-CA
v.	:	
MARK S. BLAHA,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE, A CLASS A MISDEMEANOR, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE TIMOTHY R. HANSON, PRESIDING

R. PAUL VAN DAM (3312)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellee

JOAN C. WATT
ELIZABETH A. BOWMAN
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920328-CA
v.	:	
MARK S. BLAHA,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

- - - - - - - -

APPEAL FROM A CONVICTION OF ATTEMPTED POSSESSION OF A CONTROLLED SUBSTANCE, A CLASS A MISDEMEANOR, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE TIMOTHY R. HANSON, PRESIDING

R. PAUL VAN DAM (3312)
Attorney General
DAVID B. THOMPSON (4159)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Appellee

JOAN C. WATT
ELIZABETH A. BOWMAN
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920328-CA
v.	:	
MARK S. BLAHA,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of attempted unlawful possession of a controlled substance, a class A misdemeanor, under Utah Code Ann. §§ 58-37-8(2)(a)(i) and 58-37-8(7) (Supp. 1992).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1992).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

The issues presented in this appeal are the same as those presented in State v. Robert Todd White, 920248-CA, where both parties have filed briefs, but the case has not yet been argued. White is a codefendant of defendant Blaha.

Accordingly, the State incorporates by reference its brief in White (attached as an addendum) for virtually all purposes, including the Statement of Issues Presented on Appeal and Standards of Appellate Review.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

See Addendum.

STATEMENT OF THE CASE

The State charged defendant with unlawful possession of a controlled substance, a third degree felony, under Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1992) (R. 210-11).

Defendant and his codefendant, Robert Todd White, filed a motion to suppress physical evidence allegedly seized in violation of the Fourth Amendment and article I, section 14 of the Utah Constitution (R. 228-30). After conducting a suppression hearing, the trial court denied defendant's motion (R. 268-71, 282).

Thereafter, defendant entered and the court accepted a conditional guilty plea which preserved defendant's right to appeal the suppression ruling (see State v. Sery, 758 P.2d 935, 937-40 (Utah App. 1988)) (R. 288-94, 406-14). The court entered a judgment of conviction for the offense of attempted unlawful possession of a controlled substance, a class A misdemeanor (R. 419).

The court sentenced defendant to a term of one year in the Salt Lake County Jail and fined him $2,500 plus a 25% surcharge (R. 419). However, the court suspended the sentence and placed defendant on probation, staying a 30-day jail term and payment of the fine (id.).

STATEMENT OF FACTS

The relevant facts are set forth in the State's brief

in State v. White (see Addendum).

SUMMARY OF ARGUMENT

See Addendum.

ARGUMENT

See Addendum.

CONCLUSION

Based on the arguments made by the State in State v. White, this Court should affirm the trial court's suppression ruling and defendant's conviction.

RESPECTFULLY submitted this 07 day of December, 1992.

R. PAUL VAN DAM
Attorney General

FOR

DAVID B. THOMPSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Joan C. Watt and Elizabeth A. Bowman, Salt Lake Legal Defender Assoc., Attorneys for Appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 07 day of December, 1992.

ADDENDUM

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920248-CA
v.	:	
ROBERT TODD WHITE,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL BY DEFENDANT OF CONVICTION FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 58-37-8(2)(a)(i), 58-37-8(2)(b)(ii) (1990), IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, UTAH, THE HONORABLE TIMOTHY R. HANSON, PRESIDING.

R. PAUL VAN DAM (3312)
Attorney General
J. KEVIN MURPHY (5768)
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 538-1021

Attorneys for Appellee

ROGER K. SCOWCROFT
ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

OTHER

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920248-CA
v.	:	
ROBERT TODD WHITE,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant Robert Todd White appeals his conviction of unlawful possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i), 58-37-8(2)(b)(ii) (1990). This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (1992).

ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Defendant challenges the issuance of a warrant to search his home, the authority to serve the warrant upon a "no-knock" entry, and the authority to serve the warrant at night. The State frames the issues on appeal as follows:

1. Was the Warrant to Search Defendant's Home Supported by Probable Cause? A magistrate's probable cause-based decision to issue a search warrant is given great deference on review. Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, 2331 (1983); State v. Babbell, 770 P.2d 987, 991 (Utah 1989); State v. Weaver, 817 P.2d 830, 833 (Utah App. 1991). Thus the

affidavit supporting the warrant is reviewed only for a "substantial basis" upon which the magistrate could find probable cause. See United States v. Leon, 468 U.S. 897, 915, 104 S. Ct. 3405, 3416 (1984).

2. Did the Magistrate Properly Authorize Unannounced, "No-Knock" Service of the Search Warrant? As set forth more fully in the body of this brief, a magistrate's "no-knock" decision should also be reviewed with great deference. The warrant affidavit, however, must make a particularized showing that no-knock service is necessary. State v. Rowe, 806 P.2d 730, 732-33 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991).

3. Was any Problem with the Magistrate's Authorization of Nighttime Service of the Warrant Rendered Moot, or Harmless Error, by Actual Service during the Daytime? As set forth in the body of this brief, this is a question of law, reviewable without deference to the trial court's ruling.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The fourth amendment to the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Utah's "no-knock" search statute, Utah Code Ann. § 77-23-10 (1990), states in pertinent part:

> When a search warrant has been issued . . . the officer executing the warrant may use such force as is reasonably necessary to enter:
>
> . . .
>
> (2) Without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath, that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

The text of any other constitutional, statutory, or rule provisions pertinent to the resolution of this appeal will be contained in the body of this brief.

STATEMENT OF THE CASE

Defendant Robert Todd White was charged with unlawful possession of a controlled substance with intent to distribute, a second degree felony (R. 16).[1] He moved to suppress evidence seized in a warranted search of his home, arguing that the warrant was unsupported by probable cause, and that authority to serve the warrant on a no-knock, nighttime basis was improperly granted (R. 21). The motion was denied (R. 83).

Defendant then pleaded no contest to a reduced charge of possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. §§ 58-37-8(2)(a)(i), 58-37-8(2)(b)(ii) (1990) (R. 76). As permitted under State v. Sery, 758 P.2d 935 (Utah App. 1988), defendant reserved the right to appeal the denial of his motion to suppress (id.). His zero to

---

[1]The trial court pleadings record is R. 1-104; the transcript of the suppression motion hearing is R. 105-202.

five year sentence was suspended subject to probation and payment of a fine and surcharges (R. 86). This disposition, in turn, was stayed upon issuance of a certificate of probable cause pending this appeal, brought on timely notice (R. 86, 95, 96).

STATEMENT OF FACTS

The Warrant and the Search

The warrant affidavit (R. 28-33, Appendix 2 to Br. of Appellant) was submitted by Detective Bill McCarthy, an experienced narcotics investigator with the West Valley City Police (R. 30). The affidavit recited that a confidential informant, "CI," had reported a West Valley duplex apartment to be a cocaine dealing site.

According to the affidavit, CI's spouse had purchased cocaine in the apartment, most recently within the preceding five days (R. 30). While CI had not been inside the apartment, CI had seen the spouse enter it, then exit with cocaine which the spouse then ingested (id.). The spouse had also told CI that persons inside the apartment were the spouse's cocaine source (id.). CI reported that the spouse had been purchasing cocaine at the apartment for at least the past six months (R. 31).

CI's information had been corroborated in several ways. First, Detective McCarthy checked the spouse's criminal record, uncovering a prior narcotics arrest (R. 31). Next, a "second source of information," also related to CI's spouse, had confirmed that the spouse had a long history of cocaine abuse (id.). Like CI, the "second source" had also seen the spouse at

the apartment, and heard the spouse admit to purchasing cocaine there (id.). Finally, Detective McCarthy had watched the apartment, observing vehicles arrive and stay for "a very short period of time," consistent with narcotics trafficking (id.).

McCarthy's warrant affidavit also asked permission to serve the warrant on a no-knock basis and at night (R. 32). The affidavit recited that the items to be seized, including narcotics, packaging material, paraphernalia, cash, and transaction records, could be "very easily destroyed" (R. 31-32, 33). It also recited that, according to CI, CI's spouse had been threatened by the cocaine suppliers at the apartment when the spouse had been late in paying for the cocaine; further, the spouse had threatened CI against reporting the cocaine transactions to police (R. 31).

Finally, the affidavit recited McCarthy's "firm belief" that no-knock warrant service was safer. This was based on his experience in serving "numerous narcotics search warrants w[h]ere weapons have been readily available to the occupants," and his knowledge "that more and more narcotics dealers are arming themselves to protect the sales operations from other dealers/users" (R. 32-33).

Based on the foregoing affidavit information, the magistrate issued a warrant to search the apartment (R. 25-27, Appendix 2 to Br. of Appellant). The warrant was authorized for service "without notice of authority or purpose" and "at any time of the day" (R. 25). However, while served in "no-knock"

fashion, the warrant was not served at night, but at about 10:45 in the morning of February 1, 1991 (R. 114, 127). The search revealed "five bindles of suspected cocaine" in defendant's possession, leading to the charges against him (R. 17).

The Motion to Suppress

Defendant's motion to suppress alleged the absence of probable cause to issue the warrant, and inadequate justification for no-knock, nighttime service (R. 21). Defendant also alleged that the warrant affidavit contained "false statements and material omissions of fact," but did not specify any particular falsehoods (R. 22). Finally, while the motion recited that it was based upon both the fourth amendment to the United States Constitution and Article I, section 14 of the Utah Constitution (R. 21), it was unaccompanied by any articulated argument for separate analysis under these two provisions.

At the hearing of the motion to suppress, the prosecutor cited Utah case law to the effect that the burden of proof rested with defendant (R. 109-10). Accordingly, the trial court assigned defendant to the task of proving the invalidity of the warrant (R. 113).

Upon direct examination by defense counsel, Detective McCarthy readily revealed the names of "CI" and the "second source" who had provided the information recited in the warrant affidavit. Those names are not fully repeated in this brief, out of concern for the informants' safety. However, CI turned out to be "Mrs. Jimmy;" her husband, "Jimmy," was the cocaine-habituated

"spouse" identified in McCarthy's affidavit. The "second source" turned out to be Jimmy's parents.

Detective McCarthy explained that his investigation had begun in response to Mrs. Jimmy's report of Jimmy's cocaine purchases (R. 117). She and Jimmy's parents had independent knowledge of Jimmy's transactions at the duplex apartment, although they had not directly witnessed those transactions (R. 120). Utility checks on the apartment had not revealed defendant's name, and McCarthy acknowledged that he had been unable to identify who actually lived in the apartment when he sought the warrant (R. 121).

Turning to the manner of warrant service, McCarthy reported the daytime, no-knock service. Because entry had been effected by a "SWAT" team, McCarthy could not say whether the apartment door had actually been broken open (R. 127-129). He explained the no-knock, nighttime service request in the affidavit as motivated by the reported threats toward Jimmy and Mrs. Jimmy, plus his judgment that such entry was "always safer" (R. 129, 131).[2] This judgment was probed by defense counsel, and met with some skepticism by the trial court, upon its own questions to the detective (R. 133-34, 170-73).

At the end of the hearing, the trial court ordered memoranda from the parties on the issue of whether actual daytime

---

[2]Detective McCarthy also explained that he only expected to find small, readily-disposable quantities of drugs on the premises (R. 129-30). However, this information was not clearly set forth in his affidavit.

service of the warrant mooted any problem with an improper nighttime authorization (R. 196). Also at the end of the hearing, defense counsel asserted, "One other thing I wanted to say, my argument is based on the Utah Constitution as well as the United States Constitution" (R. 199).

The parties submitted the requested memoranda (R. 39-41, 54-59). Defendant's memorandum cited Utah's statute governing nighttime search warrant service, but again, did not articulate whether the Utah Constitution was necessarily more restrictive on this question than federal law (R. 39-41).

Upon review of the memoranda and the arguments at the motion hearing, the trial court issued a written memorandum decision (R. 66-70, reproduced at the appendix to this brief). The court determined that the affidavit, "taken as a whole," established probable cause to issue the warrant (R. 67). Revisiting its concerns about the safety justification for no-knock service, the court acknowledged its lack of expertise:

> [T]he Court does not claim any expertise in police procedures, nor does the Court claim any expertise in the execution of "no knock" warrants and the hazards related thereto, and the evidence the Court has before it is from a police professional who has expressed his opinions, stated the reasons therefor[], and the Court is not at liberty to ignore that evidence, absent some legitimate reason to do so, and no legitimate legal reason appears to exist.

(R. 67-68). Therefore, the trial court ruled that the no-knock service had been properly authorized (R. 68). It further held that actual daytime service mooted any possible problem with the

magistrate's authorization of a nighttime search (id.). Accordingly, the motion to suppress was denied.

SUMMARY OF ARGUMENT

In the trial court, defendant did not articulate a separate state constitutional analysis in support of his motion to suppress. Accordingly, federal fourth amendment law controls this appeal, and requires that deference be paid to the magistrate's probable cause ruling. Deference to both the magistrate and the trial court's affirmation of the magistrate's decision is appropriate as a matter of proper respect toward these front-line judicial decision makers.

Defendant fails to show that the magistrate and the trial court both clearly erred in making and affirming the probable cause determination. His "informant unreliability" argument fails because the informants in question here, concerned relatives of a cocaine-dependent individual, can be presumed reliable. Also, Detective McCarthy's independent investigation sufficiently corroborated the information provided by those informants. Finally, the "particularity" argument raised on appeal was not presented in the trial court, and in any event fails on its merits.

As for the no-knock service, heightened deference is due to the magistrate, with an emphasis on reasonableness, not probable cause. The trial court correctly observed that judicial officers lack expertise to judge the safest means of serving search warrants. Therefore, given officer expertise, plus

specific information tending to show that the particular search may pose physical danger to anybody involved, no-knock service authority should be upheld on review. Also, because defendant revealed no details of how this no-knock search was actually effected, full review of its reasonableness is difficult.

Finally, the trial court correctly held that daytime service of this warrant mooted, or rendered harmless, any possible error in the nighttime service authorization. Such holding is supported by case law and policy. With respect to the latter, police cannot commit misconduct when they choose to carry out a search in a less intrusive manner than that authorized by the magistrate. Such choice should be encouraged, by not suppressing evidence when possible magistrate error has actually been corrected by police officers.

ARGUMENT

POINT ONE

THE MAGISTRATE'S PROBABLE CAUSE FINDING, AND THE TRIAL COURT'S AFFIRMATION OF THAT FINDING, SHOULD BE REAFFIRMED ON APPEAL.

Defendant first challenges the magistrate's probable cause determination. Under the correct, deferential standard of appellate review, the challenge should be rejected.

A. Settled Fourth Amendment Law Requires Deferential Review of the Magistrate's Probable Cause Determination.

Under the fourth amendment, a magistrate's probable cause-based decision to issue a search warrant, so long as based upon specific facts in the supporting affidavit, is reversed on

review only if it is clearly erroneous. State v. Babbell, 770 P.2d 987, 990 (Utah 1989). Accord United States v. Leon, 468 U.S. 897, 914-15, 104 S. Ct. 3405, 3416 (1984), and State v. Weaver, 817 P.2d 830, 833 (Utah App. 1991) ("great deference" accorded to magistrate's determination). In making that decision, a magistrate must "make a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 235, 103 S Ct. 2317, 2332 (1983). Accord Weaver, 817 P.2d at 833 (probability or "reasonable belief," not certainty, is standard for issuance of warrant).

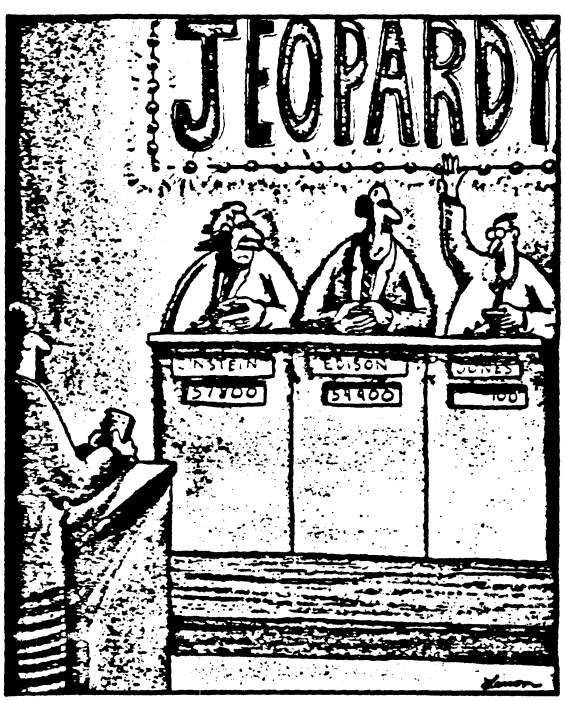
1. Waiver of State Constitutional Argument.

At some length, defendant argues that this Court should not defer to the magistrate's probable cause ruling (Br. of Appellant at 7-13). His argument depends heavily on the appendix to State v. Rowe, 806 P.2d 730 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991), and on a concurring opinion in Weaver that criticizes the deferential fourth amendment approach. He therefore asks this Court to apply non-deferential search warrant review under Article I, section 14 of the Utah Constitution (Br. of Appellant at 13).

The first problem with defendant's argument is that he did not properly articulate a separate, more rigorous analysis under the state constitution than under the fourth amendment. His written motion to suppress and his argument at the hearing of

that motion did no more than nominally cite Article I, section 14 (R. 21, 199). His memorandum in support of that motion, asking to invalidate the warrant "on State constitutional grounds" (R. 41), actually relied on Utah statutes, not constitutional provisions, and was limited to the narrow issue of possible mootness of the nighttime warrant service authorization.

Under these circumstances, defendant has not preserved his state constitution-based warrant challenge for review by this Court. See State v. Bobo, 803 P.2d 1268, 1272-73 & n.5 (Utah App. 1990) (state constitutional arguments must be properly articulated and thoughtfully analyzed in the trial courts to allow appellate review). He failed to prevent the now-asserted error by timely drawing it to the trial court's attention:



"Excuse me . . . I know the game's almost over, but just for the record, I don't think my buzzer was working properly."

Accord State v. Johnson, 821 P.2d 1150, 1161 (Utah 1991) (trial court must be given first opportunity to correct its errors). Nor has he demonstrated "plain error" or "exceptional circumstances" that might afford him relief from the appellate waiver normally resulting from such failure. See State v. Archambeau, 820 P.2d 920, 922-26 (Utah App. 1991).

2. Reasons for Deferential Appellate Review.

While defendant's state constitution-based argument should be rejected on the basis of waiver alone, revisitation of considerations supporting deferential appellate review of search warrants seems appropriate. This question has been debated by the State and counsel for defendant on several occasions, including State v. Rosenbaum, No. 910514-CA, and State v. Ruiz, No. 920126-CA, now pending before this Court. The State's position in those cases, briefly put, is that appellate deference is proper, as a matter of respect for magistrates and trial court judges. Those judicial officers, sworn to uphold the federal and state constitutions in a fashion that favors neither the State nor criminal suspects, should be presumed to have done so absent the clearest showing to the contrary.

Here defendant implies, without directly asserting the point, that the foregoing presumption is invalid. He refers, for example, to "meaningful," "neutral and detached," and "thorough" judicial review of warrant affidavits, as if to suggest that only appellate courts, not magistrates and trial courts, are capable of such review (Br. of Appellant at 7, 12). He also suggests

that police officers may "forum shop" for magistrates less inclined toward, or less capable of, careful scrutiny of warrant affidavits (Br. of Appellant at 10).

Supporting his "forum shopping" theory, defendant asks this Court to "take judicial notice of the fact that Utah magistrates do not uniformly have the opportunity to develop expertise in issuing search warrants" (Br. of Appellant at 9). Not only does this "fact" not seem "capable of ready and accurate determination" under Rule 201(b), Utah Rules of Evidence, it appears to be untrue. Under Rule 3-403, Utah Code of Judicial Administration, "all judges, commissioners and court staff," which would seem to encompass magistrates, receive thirty hours of orientation upon appointment, and thirty hours per year of continuing judicial education. Thus it appears that magistrates are uniformly required to develop their skills.

If non-deferential review of search warrants is ever to be implemented, then, it should be done on some basis other than unsupported innuendo to the effect that magistrates and trial courts cannot "meaningfully" assess warrant affidavits in the required detached and neutral fashion. Until and unless Utah's appellate courts assume front-line responsibility for probable cause determinations, deference to the judicial officers who now perform that function should be maintained.[3]

---

[3]Indeed, a procedure might be developed in which warrants are issued only by "on call" appellate panels, utilizing modern electronic communication. Similarly, after-the-fact search and seizure review might limit trial courts to finding such "underlying facts" as may be needed (presumably none in the case of warrant

Accordingly, especially in cases involving warrant-supported searches, defendants seeking to suppress the fruits of a search should be held to a heavy burden of persuasion, under both federal and state constitutional standards. See Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684 (1978) (search warrant presumed valid). In the trial court, such a defendant should be required to show clear error in the magistrate's issuance of the warrant. See State v. Bankhead, 30 Utah 2d 135, 514 P.2d 800, 802 & n.1 (1973). Upon failing to carry that burden in the trial court, defendant's burden should be even heavier on appeal.

B. The Trial Court Correctly Rejected Defendant's Challenge to the Magistrate's Issuance of the Search Warrant.

Defendant correctly states that review of a probable cause determination examines the "totality of the circumstances," which may include "informant reliability" issues (Br. of Appellant at 14-15). See Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983); State v. Anderson, 701 P.2d 1099, 1101-02 (Utah 1985); Weaver, 817 P.2d at 832-33. This case appropriately calls for a look at informant reliability, for Detective McCarthy's investigation did not directly reveal defendant's criminal behavior. Compare State v. Purser, 828 P.2d 515, 516 (Utah App. 1992) (defendant sold drugs in "controlled buy" arranged by officer). Nevertheless, bearing in mind the

---

affidavits, cf. Weaver, 817 P.2d at 836), followed by immediate certification of the case to an appellate panel for the probable cause conclusion to be derived from those facts.

proper burden of proof and standard of review, the trial court's denial of defendant's motion to suppress should be affirmed.

1. The Motion Hearing: Opportunities Lost.

In being afforded an evidentiary hearing to challenge the search warrant, defendant was actually aided more than he deserved in his motion to suppress. Because his motion contained only a bare assertion that the warrant affidavit contained material falsehoods, he was not entitled to put on any evidence. See Franks, 438 U.S. at 171-72, 98 S. Ct. at 2684-85, adopted in State v. Nielsen, 727 P.2d 188, 191 (Utah 1986) (absent specific threshold showing of deliberate material falsity by warrant affiant, defendant challenging probable cause cannot have evidentiary hearing). Defendant could have been limited to arguing only the sufficiency of the warrant affidavit.

Defendant received another "gift" when Detective McCarthy disclosed the identities of the confidential informants who had given information used in the warrant affidavit. He was by no means obliged to give this information. Purser, 828 P.2d at 519-20 (citing authorities). Once they were identified, however, defendant could have called Mrs. Jimmy, Jimmy's parents, and even the cocaine-habituated Jimmy himself to testify at the hearing of the motion to suppress. In short, at the time of that hearing, the validity of the warrant was no longer dependent upon "unnamed police informers," cf. State v. Treadway, 28 Utah 2d 160, 499 P.2d 846, 848 (1972). The informants were named, and could have been called as witnesses to ascertain whether

Detective McCarthy truthfully recounted their statements in his warrant affidavit, and to test their reliability.

Defendant thus had ample opportunity, well beyond what could be expected, to challenge this warrant in the trial court. His failure to take full advantage of that opportunity should be held against him on appeal, especially in regard to his "informant unreliability" argument.

2. Informant Reliability Was Adequately Shown.

In State v. Brown, 798 P.2d 284 (Utah App. 1990), this Court, citing Treadway, reiterated the principle that "[c]ourts view the testimony of citizen informers with less rigid scrutiny than the testimony of police informers. . . . This is because citizen informers, unlike police informers, volunteer information out of concern for the community and not for personal benefit." 798 P.2d at 286. Accordingly, the "concerned citizen" informant in Brown was deemed sufficiently reliable to not require "rigid scrutiny," id. at 286-87.

In this case, Detective McCarthy's affidavit reveals that his informants should be deemed even more reliable than the "concerned citizen" in Brown. These informants were concerned not just with community well-being, but with that of a close family member, "Jimmy." Common sense strongly suggests that their motive in reporting the apparent criminal activity was not some kind of "revenge," but more likely an understandable desire to interrupt their loved one's drug habit. The affidavit also reflected that the informants had observed independent instances

in which Jimmy apparently purchased cocaine in the suspect apartment. Accordingly, the informants corroborated each others' reports, each buttressing the reliability of the other.

3. Independent Corroboration of Informant Reports.

Detective McCarthy's independent investigation also supported the magistrate's finding of "a fair probability that contraband or evidence of a crime" would be found in the apartment, Gates, 462 U.S. at 235, 103 S. Ct. at 2332. While McCarthy did not directly confirm criminal activity in the apartment, he did uncover independent circumstantial evidence supporting his informants' reports. Jimmy, the "spouse" identified in the affidavit, was independently found to have a criminal narcotics record (R. 31). Traffic to and from the apartment was observed to fit a pattern consistent with drug trafficking (id.).

Nor was the "hearsay upon hearsay" nature of the informants' reports a bar to issuance of the warrant. See Nielsen, 727 P.2d at 191-92 (double hearsay, if reliable, not a problem in warrant issuance); Utah R. Evid. 805, 1101(b)(3). This was especially so once Jimmy's history of drug abuse was independently confirmed, making it more reasonable to infer that his visits to the apartment were indeed for illicit purposes.

4. Particularity Requirement.

Defendant also complains that the warrant and affidavit failed to identify the apartment to be searched with sufficient particularity (Br. of Appellant at 17). This issue was not

raised in the motion to suppress, nor pursued at the hearing of that motion, and was therefore waived. It was also appropriately waived: the premises to be searched are clearly identified by number and directional coordinates as but one of two "duplex" apartments (R. 25). Clearly, apartment 3720 was to be searched; apartment 3718 was to be left alone.

In a novel but also unpreserved argument, defendant asserts that the warrant affidavit should have included specific evidence that the contraband to be seized could not have been obtained by subpoena (Br. of Appellant at 19, citing Utah Code Ann. § 77-23-3(2) (1990)). Briefly, it seems unlikely that someone suspected of dealing in illicit drugs would comply with a subpoena requiring him or her to surrender evidence of such activity. Indeed, unless such a person were foolish beyond belief, he or she would be expected, upon receiving such a subpoena, to expeditiously conceal or destroy such evidence. Recitation of the likely failure of the subpoena process, then, hardly seems necessary in a case like this one.

5. Summary: Totality of the Circumstances.

All in all, McCarthy's affidavit showed the following: a confirmed narcotics abuser was reported, reasonably reliably, to be purchasing cocaine at a specific apartment, where other traffic consistent with drug dealing was also observed. These factors, in their totality, provided a substantial basis for the magistrate's probable cause finding. The federally-required deference to that finding, coupled with affirmation of that

finding by the trial court, should obligate this Court to reaffirm the issuance of the warrant. This is so even if this Court, had the warrant affidavit been presented to it in the first place, might have not issued the warrant.

POINT TWO

THE MAGISTRATE'S AUTHORIZATION OF NO-KNOCK WARRANT SERVICE SHOULD BE REAFFIRMED.

Defendant next contends that the magistrate erred in authorizing "no-knock" service of the search warrant. This contention was correctly rejected by the trial court.

A. No-Knock Warrant Service Authority Should be Deferentially Reviewed for Reasonableness.

By its terms, Utah's no-knock statute comes into play only "[w]hen a search warrant has been issued . . .." Utah Code Ann. § 77-23-10 (1990). Its focus is not probable cause, but only the question of how the search will be conducted. See State v. Buck, 756 P.2d 700, 703 (Utah 1988) (no-knock challenge did not assail underlying search, but only "the manner of entry"). The no-knock statute requires "proof" that if the search is announced, evidence "may" be lost, or that physical harm to any person "may" result. Utah Code Ann. § 77-23-10(2).

Defendant stresses the no-knock "proof" requirement (Br. of Appellant at 22). However, the "may" language should be emphasized, giving rise to a lower standard of proof for no-knock authority than for issuance of the underlying warrant. After all, the warrant is a judicial order to search a particular place, Utah Code Ann. § 77-23-1 (1990), based upon probable

cause. The no-knock statute should not revisit probable cause: instead, it should be viewed as setting the parameters of reasonableness in following the judicial order.

In assessing the reasonableness of a no-knock request, deference to the police, charged with carrying out the search, is appropriate. See Dalia v. United States, 441 U.S. 238, 257, 99 S. Ct. 1682, 1693 (1978) (question of how to conduct warrant-authorized search "is generally left to the discretion of the executing officers," subject to reasonableness requirement). They, not reviewing judges, possess the hands-on expertise in conducting searches. They, not reviewing judges, are directly responsible for protecting the physical safety of everybody affected by this hazardous undertaking. In this case the trial judge, reviewing the no-knock request, properly acknowledged his own lack of expertise and upheld the no-knock service authorized by the magistrate (R. 67-68).

Consistent with the position it has advanced in State v. Rosenbaum, No. 910514-CA (pending), and with State v. Rowe, 806 P.2d 730, 732-33 (Utah App.), cert. granted, 817 P.2d 327 (Utah 1991), the State believes that deference to an officer's no-knock warrant service request must have appropriate limitations. Thus while officer expertise with searches generally must be considered in screening or reviewing such a request, some additional evidence, particular to the case at hand, must be presented to justify or affirm a no-knock request. Rosenbaum, Br. of Appellee at 22; Rowe, 806 P.2d at 733 ("sparse"

affidavit contained sufficient case-specific information to support no-knock service).

Subject to the foregoing limitation, then, no-knock authority, granted by the warrant-issuing magistrate and affirmed by the trial court, should be reviewed on appeal with the utmost deference. Such authority should be reversed only upon a determination that it was clearly unreasonable to grant it.

B. The Warrant Affidavit Adequately Supported No-Knock Service Authority.

With the foregoing standards in mind, this Court should reaffirm the magistrate's no-knock authorization. With regard to general experience, the warrant affidavit established that Detective McCarthy had extensive experience in the preparation and service of narcotics search warrants (R. 30). That experience had led him to conclude that no-knock warrant service is "always safer," because narcotics dealers are often armed (R. 32-33).[4] This likelihood has also been noted by Utah's appellate courts. See State v. Dorsey, 731 P.2d 1085, 1092 (Utah 1986) (Zimmerman, J., concurring); State v. Leonard, 825 P.2d 664, 670 n.9 (Utah App. 1991), petition for cert. filed, No. 920140 (Utah March 11, 1992). Thus a general but well-recognized physical safety risk was present.

---

[4]See Commonwealth v. Grubb, 595 A.2d 133, 135 n.3 (Pa. Super. 1991) (officer had found weapons ninety percent of the time, over course of 200 searches). Interestingly, at the hearing on the motion to suppress, McCarthy retreated somewhat from his assertion that no-knock service is always safer, acknowledging that "some" narcotics searches do not require such service (R. 132).

There was also a case-specific safety risk. Mrs. "Jimmy" had reported threats from the occupants of the apartment, directed toward Jimmy and, through Jimmy, toward her (R. 31, 32). Admittedly, this did not constitute conclusive proof that the police search would be met with violence; however, such certainty is not and should not be required. Where a safety justification for a no-knock search is presented, an officer's request to take precautions need only be reasonable. See State v. Roybal, 716 P.2d 291, 293-94 (Utah 1986) (affirming the reasonableness of precautions when officers "enter hostile environs"). Thus the specific, if slender, possibility of violence in this case should be held sufficient to uphold no-knock warrant service.

Section 77-23-10(2) also allows no-knock warrant service upon a showing "that the object of the search may be quickly destroyed, disposed of, or secreted" upon announcement of the search. Here the suspected criminal activity, cocaine dealing, would seem to suggest ready disposal of the evidence. See Rowe, 806 P.2d at 733 (small amount of drugs suspected; no-knock authority upheld). Compare State v. Pierson, 472 N.W.2d 898, 903 (Neb. 1991) (search for slot machine; no-knock entry not needed). Unfortunately, while Detective McCarthy expressed his belief that he would only find small, quickly-disposable quantities of drugs at the apartment during the hearing of the suppression motion (R. 126), he did not clearly set this out in his warrant affidavit. Further, given that he also sought evidence of a major sales operation--packaging material, cash,

and records (R. 32-33)--it seems that the "ready disposability" inference was rather weak. Accordingly, this no-knock search depended primarily on the better-articulated safety concerns.

Regarding those concerns, where a magistrate determines that the risk of physical harm to persons outweighs problems of fright or property damage resulting from a no-knock search, as contemplated by section 77-23-10(2), that determination should be given deference. The trial court correctly deferred to the magistrate's decision. This Court should do the same, and reaffirm the no-knock service authority in this search warrant.

C. There is Insufficient Evidence to Fully Review the Propriety of this No-Knock Search.

It should also be noted that defendant failed to elicit adequate evidence upon which the reasonableness of this search can be assessed. The reasonableness of a warranted search "depends on the facts of the case." Buck, 756 P.2d at 703. See also State v. Sessions, 583 P.2d 44, 45 (Utah 1978) ("a defendant must submit some evidence in support of his motion to suppress or the motion would be denied"). Defendant's sole witness at the hearing of his motion to suppress, Detective McCarthy, could not relate the exact manner of this no-knock search: he only knew that the apartment door was "probably forced open" (R. 127).

With reasonableness the standard, the manner in which a search is actually conducted must be known if after-the-fact review is to be meaningful. Even a "no-knock" search, more properly a search "without notice of [the officer's] authority and purpose" under section 77-23-10, can be carried out in a wide

variety of more or less reasonable ways. On the one hand, searching officers might find the door to the premises open or unlocked, or might use a ruse to obtain entry. On the other, extreme violence, well beyond what a magistrate would contemplate in authorizing no-knock service, might be imagined.

In short, no-knock searches should not all be presumed to be the same. Defendants wishing to challenge no-knock authority should bear this in mind, and present sufficient evidence to meaningfully support such challenges.

POINT THREE

ACTUAL SERVICE OF THE WARRANT DURING THE DAYTIME MOOTED, OR RENDERED HARMLESS, ANY ERROR IN THE MAGISTRATE'S AUTHORIZATION OF A NIGHTTIME SEARCH.

A significant piece of evidence that defendant did elicit was the fact that this search was carried out during daylight hours, even though the magistrate had authorized nighttime warrant service (R. 34, 127). The trial court held that such actual service mooted any possible problem with the nighttime authority. Assuming, without deciding, that nighttime service was improperly authorized, that holding was correct.

In State v. Buck, 756 P.2d 700 (Utah 1988), officers conducted a warranted residential search upon a no-knock entry, failing to recognize that their warrant did not authorize such entry. However, nobody was home at the time. Id. at 700-01 & n.1. The Utah Supreme Court held that because nobody was home when the search occurred, the safety and privacy concerns underlying the normal "knock-and-announce" requirement had not

been implicated. Id. Therefore, suppression of the seized evidence was not required. Id. at 702-03 (citing authorities).

Under Buck, if a search warrant is executed in a clearly unauthorized manner, but privacy and safety interests are infringed no more than they would be in a routine search, the fruits of the search are admissible as evidence. It should follow that if a no-knock or nighttime entry is authorized in a warrant, but officers do not actually execute the warrant on such basis, the seized evidence is also admissible. Indeed, in People v. Barber, 449 N.Y.S. 2d 140, 145 (N.Y. App. Div. 1982), evidence was not suppressed where police did not rely upon an improper no-knock authorization, but instead announced themselves when serving the warrant. Similarly, in State v. Sherrick, 98 Ariz. 46, 402 P.2d 1, 9 (1965) (en banc), evidence seized during a daylight search was not suppressed, even though the warrant improperly authorized a nighttime search.

Cases such as Buck, Barber, and Sherrick stand for the principle that where violation of a criminal procedure rule does not violate a "fundamental" constitutional right, suppression of evidence obtained through such violation is not required. See State v. Fixel, 744 P.2d 1366, 1368-69 (Utah 1987) (officer improperly acted outside his statutory authority; because he did not thereby violate defendant's "fundamental" rights, evidence was admissible). Similarly here, no "fundamental" right of defendant to avoid a nighttime search was violated: no nighttime search occurred.

Further, suppression of evidence under these circumstances would actually deter laudable police conduct. The officers here conducted this search in a less intrusive manner than authorized in their warrant. If the seized evidence is nevertheless suppressed, in some effort to deter magistrate error, police officers will have no incentive to effectively correct such errors themselves.

Clearly the better approach, if the concern is ultimately with protecting citizens against actual unreasonable searches, is to leave room for officers to re-think, and not rely upon, questionable magistrate orders. Indeed, United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984), avoids suppression where officers reasonably rely upon a warrant that is later invalidated. That being the case, it is surely wise policy to avoid suppression where officers do not rely upon some provision in a search warrant that might be questionable. Indeed, such officer conduct should be encouraged.

"Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded." Utah R. Crim. P. 30(a). If the magistrate erred in authorizing a nighttime search, such error should be disregarded. The trial court's ruling comported with this rule, and should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying defendant's motion to suppress evidence, and his subsequent conviction, should be affirmed.

RESPECTFULLY SUBMITTED this 25 day of September, 1992.

R. PAUL VAN DAM
Attorney General

J. KEVIN MURPHY
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing Brief of Appellee was mailed, postage prepaid, to ROGER K. SCOWCROFT AND ELIZABETH HOLBROOK, attorneys for appellant, Salt Lake Legal Defenders Association, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 25 day of September, 1992.

Appendix

(Trial Court's Memorandum Decision)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 911900752 911900753
vs.	:	
MARK S. BLAHA, ROBERT TODD WHITE,	:	
Defendants.	:	

Before the Court is the Motion of the defendants above-named, through their counsel of record, to suppress evidence seized as a result of a search warrant authorizing search of the premises known as 3720 South 3375 West in Salt Lake County, State of Utah. The warrant was issued on January 31, 1991 after presentation to Circuit Court Judge William A. Thorne, acting as magistrate of the Third Circuit Court.

The matter was before the Court on December 4, 1991, where evidence was presented and oral argument had. Following oral argument, the Court indicated that it would take the matter under advisement and allow counsel time to brief a legal issue that had arisen based upon the evidence received during the hearing on the question of whether or not the daytime execution

of this warrant moots any potential defects that may have been part of the issuance of the warrant relating to nighttime execution. The parties have filed their respective pleadings, the Court has considered the same, and being fully advised, enters the following Memorandum Decision.

The Court is satisfied that the allegations in the Affidavit, taken as a whole, are sufficient to authorize the issuance of a search warrant. The Court is further satisfied that the evidence supports a finding that the additional provision in the search warrant authorizing "no knock" execution is satisfactory. The evidence suggests that the "no knock" warrant in this case was appropriate because of the potential of the destruction of evidence, particularly where small amounts may be involved, and for the safety of not only officers executing the warrant, but the persons who may be on the premises when the warrant is executed.

While the Court expressed concerns in its questioning of the State's witnesses in this matter regarding the concept of safety, the Court does not claim any expertise in police procedures, nor does the Court claim any expertise in the execution of "no knock" warrants and the hazards related thereto, and the evidence the Court has before it is from a

police professional who has expressed his opinions, stated the reasons therefore, and the Court is not at liberty to ignore that evidence, absent some legitimate reason to do so, and no legitimate legal reason appears to exist.

Based upon the foregoing, the Court finds that there is sufficient basis for the issuance of the "no knock" special provisions of this warrant.

Turning to the question of whether or not there is sufficient basis to authorize the execution of the warrant during the nighttime, the Court is satisfied that any potential defects in the contents of the supporting documentation and the warrant authorizing its execution at nighttime has been mooted, inasmuch as the warrant was not executed in the nighttime, but rather during the daytime.

Based upon the foregoing, the Court concludes that the defendants' Motions to Suppress must and should be denied.

Counsel for the State is to prepare an Order indicating the Court's denial of the defendants' Motion to Suppress, and present the same to the Court for review and signature pursuant to the Code of Judicial Administration.

This matter is further scheduled on the Court's calendar to determine what additional dates, trial or otherwise, are

necessary to bring this matter to a conclusion. Counsel and the defendants are to be present at the date indicated in the attached notice.

Dated this 23 day of January, 1992.

TIMOTHY R. HANSON
DISTRICT COURT JUDGE

Evelyn Thompson
Attest

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 24 day of January, 1992:

Kenneth R. Updegrove
Deputy County Attorney
Attorney for Plaintiff
2001 S. State, Suite S3700
Salt Lake City, Utah 84190-1200

Roger K. Scowcroft
Elizabeth A. Bowman
Attorneys for Defendants
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Evelyn Thompson